INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement:	
1. Background	2
2. The instant suits	4
Argument	8
Conclusion	14

CITATIONS

Cases:	
Barnes v. *Alexander*, 232 U.S. 117	11
Doerschuck v. *Mellon*, 55 F. 2d 741	13
Dugan v. *Rank*, 372 U.S. 609	9
Hawaii v. *Gordon*, 373 U.S. 57	9
Hawley v. *Hawley*, 114 F. 2d 745	13
Houston v. *Ormes*, 252 U.S. 469	10, 11, 13
Kelberine v. *Societe Internationale*, 363 F. 2d 989, certiorari denied, 385 U.S. 989	2, 8, 11, 12, 13
Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682	9
Malone v. *Bowdoin*, 369 U.S. 643	9
Mellon v. *Orinoco Iron Co.*, 266 U.S. 121	10
Mine Safety Co. v. *Forrestal*, 326 U.S. 371	9
Panama Canal Co. v. *Grace Line, Inc.*, 356 U.S. 309	12
Societe Internationale v. *Kennedy* (C.A. No. 4360–48, D.D.C.)	3, 11

260-962—67——1

Cases—Continued

	Page
Societe Internationale v. *McGranery*, 111 F. Supp. 435, affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F. 2d 532, certiorari denied, 350 U.S. 937	2
Societe Internationale v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F. 2d 254	2
Stevan v. *Union Trust Co.*, 316 F. 2d 687	13
United States v. *Leventhal*, 316 F. 2d 341	13

Statutes:

Trading With the Enemy Act, as amended, Section 39, 50 U.S.C. App. 39	3
40 U.S.C. 308, 309	9, 10, 13
50 U.S.C. App. 2001–2016	3

Miscellaneous:

Exec. Order No. 9788, 11 Fed. Reg. 11981	3

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1062

ROBERT A. SCHMITZ, ET AL., PETITIONERS

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL) AND HENRY H. FOWLER, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (J.A. 44)[1] is reported at 249 F. Supp. 757. The court of appeals rendered no opinion, but affirmed the judgment below "on the opinion of the District Court" (Pet. App. 1a–2a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on November 14, 1966. The peti-

[1] "J.A." refers to the Joint Appendix in the court of appeals and "Pet. App." to the appendix to the petition for certiorari.

tion for a writ of certiorari was filed on February 13, 1967. The jurisdiction of this Court is invoked under 12 U.S.C. 1254(1).

QUESTION PRESENTED

In 1963, Societe Internationale and the Attorney General of the United States settled the litigation between them relating to the ownership of certain shares of General Aniline & Film Corporation stock which had been vested by the Alien Property Custodian in 1942. So far as respondent Secretary of the Treasury is concerned, the question presented is whether petitioners' actions (1) to enjoin that official from making certain payments to Societe Internationale in accordance with the terms of that settlement, and (2) to compel him to pay over more than $17,000,000 to petitioners in settlement of their private claims against Societe Internationale, were properly dismissed as unconsented suits against the United States.

STATEMENT

1. BACKGROUND

This action by petitioners to reach some $17,362,000.00 on deposit in the United States Treasury is another facet of the "Interhandel" litigation.[2] In 1942 the Alien Property Custodian, acting under the

[2] See *Societe Internationale* v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F. 2d 254 (C.A.D.C.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C.), affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F. 2d 532 (C.A.D.C.), certiorari denied, 350 U.S. 937; *Kelberine* v. *Societe Internationale*, 363 F. 2d 989 (C.A.D.C.), certiorari denied, 385 U.S. 989.

Trading with the Enemy Act, 50 U.S.C. App. 1 *et seq.*, vested stock in the General Aniline & Film Corporation owned by co-respondent Societe Internationale Pour Participations Industrielles et Commerciales, S.A. ("Interhandel"), a Swiss holding corporation. Interhandel brought suit under Section 9(a) of the Trading with the Enemy Act to compel the government to return the vested shares. This suit was finally ended in 1963 by a "Stipulation of Settlement" (J.A. 59–71) between the Swiss corporation and the Attorney General [3] filed with the district court. *Societe Internationale* v. *Kennedy* (C.A. No. 4360–48, D.D.C.).

Under the terms of the settlement, the vested General Aniline stock was sold to the public in March 1965. Of some $329,000,000 realized from the sale, approximately $120,000,000 was Interhandel's share.[4] The settlement agreement, however, expressly subjected Interhandel's share to certain indemnity provisions in favor of the government (§§ VIII and IX, J.A. 66–69). In particular, Interhandel agreed to "indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all

[3] By Executive Order No. 9788 of October 14, 1946, 11 Fed. Reg. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

[4] Pursuant to Section 39 of the Trading with the Enemy Act, 50 U.S.C. App. 39, the bulk of the government's share of the settlement proceeds was transferred to the War Claims Fund to be used in satisfying the claims of American citizens who suffered losses in World War II. See 50 U.S.C. App. 2001–2016.

claims, actions, or liabilities" which might arise from carrying out the terms of the settlement, from the operations of General Aniline & Film Corporation while under government control, and from the claims of certain other persons and of the Netherlands Government relating to the ownership of the shares sold (§ IX(2), J.A. 67–68).

To insure Interhandel's performance of its indemnity obligations, the Stipulation of Settlement provided that Interhandel's share of the proceeds of sale would be deposited in an account in its name in the Treasury and invested in U.S. Treasury obligations to "be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" (§§ VIII(1), VIII(4), J.A. 66–67). Should any liability be imposed which Interhandel is required by the settlement to indemnify, the government has the right to cancel an appropriate amount of those Treasury obligations (§ IX(5), J.A. 68–69). The funds in the Treasury can be released to Interhandel only when and to the extent that "the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by * * * this Stipulation" (§ VIII(4), J.A. 67). In the case at bar, petitioners seek to reach that indemnity fund for the purpose of satisfying their own claims against Interhandel.

2. THE INSTANT SUITS

a. Petitioners Herman A. Schmitz, *et al.*, represent the estate of the late Dietrich A. Schmitz, a former

chairman of the board of directors and president of the General Aniline & Film Corporation. On behalf of the estate, they instituted suit against Interhandel in August 1965, seeking to recover $10,000,000.00, plus interest, from that corporation. Their complaint (J.A. 22) alleged that, immediately prior to the entry of the United States into World War II, Dietrich A. Schmitz was the president and chairman of General Aniline & Film, as well as the holder of Interhandel's proxies for the General Aniline shares it owned (93 percent of the outstanding stock), thus enabling Dietrich Schmitz to control the election of General Aniline's entire board of directors (J.A. 24). The complaint further alleged that Dietrich Schmitz was a naturalized American citizen (J.A. 24) but that his brother was both a German national and the chairman of the financial board of I. G. Farbenindustrie, the largest German chemical and industrial combine (J.A. 25–26). When Interhandel's shares of General Aniline stock were vested by the Alien Property Custodian as enemy property in 1942, Dietrich Schmitz was removed from his high corporate positions with General Aniline (J.A. 26).

The complaint continued with allegations that, pursuant to authorization by Interhandel's directors (J.A. 29), Dietrich Schmitz thereafter devoted all of his efforts to the protection of Interhandel's interests in the General Aniline & Film Corporation and that "[a]s a result of decedent's almost single-handed effort, the United States government never was able to obtain proof that any German had any interest, direct or indirect, in General Aniline * * * " (J.A. 29), thus

placing Interhandel in a position to negotiate the eventual settlement of its suit with the government (*ibid.*). The complaint alleged that Dietrich Schmitz's services and expenditures in Interhandel's behalf were worth $10,000,000 and hence that his estate had a lien for that amount (plus interest) on Interhandel's share of the settlement proceeds (J.A. 31).

b. Petitioner Robert A. Schmitz is the son of the late Dietrich Schmitz. The substance of his complaint against Interhandel (J.A. 3) relates to his unsuccessful efforts, allegedly on that corporation's behalf, to sell the General Aniline stock in controversy to an American buyer (J.A. 5–6), and to his allegedly successful efforts in obtaining Charles E. Wilson (former president of the General Electric Company) to represent Interhandel in certain of its negotiations with the United States Government for the return of the vested stock (J.A. 6–10). According to the allegations of the complaint, it was through Mr. Wilson's efforts that the unfavorable "image" of Interhandel held in American government circles was erased, thereby greatly facilitating the settlement of Interhandel's suit against the United States. The complaint further alleged that the chief executive officer of Interhandel had agreed orally that in compensation for his services Robert Schmitz was to receive 5 percent of any money Interhandel might receive from the settlement of its suit; and that this agreement was intentionally not reduced to writing, and kept secret (J.A. 9). On the basis of this secret agreement, Robert H. Schmitz claimed entitlement

to, and a lien upon, $7,250,000 of the settlement proceeds, plus an additional $112,000 from Interhandel for other services rendered to that corporation.

c. The Secretary of the Treasury was also named as a defendant in both complaints, but solely to insure petitioners' recovery from the indemnity fund in the Treasury (p. 4, *supra*) in the event that their suits against Interhandel were successful. To this end, petitioners' complaints asked for court orders enjoining the Secretary from disbursing "any portion" of the fund in the Treasury representing Interhandel's share of the proceeds of settlement; appointing a receiver to hold the $17,362,000 claimed by petitioners; declaring that this sum was owing from Interhandel to petitioners; and directing that the money be paid over to petitioners from the Treasury and that process issue against Interhandel by publication (J.A. 11–12, 31–32). Petitioners served their complaints on Interhandel only by registered mail addressed to Interhandel's principal place of business in Switzerland (J.A. 13–14; 34–35).

d. Both the Secretary and Interhandel moved to dismiss the complaints. The district court, in a consolidated opinion covering both actions, ruled in favor of the defendants. As to the Secretary, the court ruled that the suit was in reality one against the United States, since the relief sought would expend itself on funds in the Treasury in which the government had a substantial interest and which could not be disbursed except in the discretion of the At-

torney General; that the United States had not consented to the suit and, therefore, that the court lacked jurisdiction to entertain it; and that petitioners' offer—made in court—to "postpone" their lien on the funds until the United States had no further interest in them was insufficient to provide a jurisdictional basis for the suits (J.A. 50–54). At the same time, the court ruled that petitioners' suit against Interhandel could not be entertained, since the complaints were insufficient to establish an equitable lien and, therefore, did not provide a valid basis for substituted service upon Interhandel (J.A. 52).

The Court of Appeals for the District of Columbia Circuit "affirmed on the opinion of the District Court" (Pet. App. 1a–2a), citing as additional authority its intervening decision in *Kelberine* v. *Societe Internationale*, 363 F. 2d 989, certiorari denied, 385 U.S. 989. *Kelberine* was a similar suit by private individuals to reach the settlement proceeds in the Treasury in order to satisfy claims against Interhandel, and had also been dismissed as an unconsented suit against the United States.

ARGUMENT

The decision below, affirming the district court's dismissal of the complaint against the Secretary of the Treasury, is clearly correct. There is no conflict or other occasion warranting review by this Court.

1. It is fundamental that in the absence of an express waiver of sovereign immunity no court may en-

tertain a suit against the United States,[5] and that an action nominally brought against a government official is against the United States "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738 * * *, or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act,' *Larson* v. *Domestic & Foreign Corp.*, [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank*, 372 U.S. 609, 620. Since petitioners' avowed purpose in naming the Secretary of the Treasury as a defendant was to reach a large sum of money in the United States Treasury and to prevent the carrying out of the terms of an agreement settling a major lawsuit against the government, the district court rightly held that "the action is clearly one against the United States which has not consented to be sued" (J.A. 52) and must be dismissed.

Petitioners do not contend that the government has in any way consented to their suit, as indeed it has not.[6] Rather, they invoke the exception to the prin-

[5] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

[6] While petitioners have reprinted 40 U.S.C. 308 and 309 in their petition (pp. 3–4), they concede (p. 15) that "sections 308 and 309 do not contain any consent to sue the government." This concession is not surprising in view of the express language of § 308 that:

"Nothing herein contained shall, however, be considered as recognizing or conceding any right to enforce by seizure, arrest, attachment, or any judicial process, any claim against any property of the United States, or against any property held, owned, or employed by the United States, or by any department

ciple of sovereign immunity announced in *Houston* v. *Ormes*, 252 U.S. 469,[7] and *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121.[8] Applying the principle that mandamus

---

thereof, for any public use, or as waiving any objection to any proceeding instituted to enforce such claim."

Section 309 merely implements § 308 (J.A. 53).

[7] In *Houston* v. *Ormes*, Congress had appropriated a $1,200 fund to satisfy a Court of Claims award to an individual and had referred the fund to the Secretary of the Treasury for disbursement. The plaintiff's attorney sought to impress an "equitable lien" upon the fund. This Court allowed the lien, holding that joining the Secretary of the Treasury and the Treasurer of the United States in the action did not make it a suit against the United States since only a "ministerial" duty involving no "discretion" remained to be performed, and that the government officials could be ordered as individuals to surrender the fund to a receiver appointed by the Court. In reaching that conclusion, the Court stressed that the United States had absolutely no claim or interest in the fund and that, inasmuch as the attorney's nonresident client had voluntarily appeared and personal jurisdiction had been obtained over her, she could be required to give a good acquitance to the United States, which would thereafter be excused from liability for the $1,200.

[8] In *Mellon* v. *Orinoco Iron Co.*, the Secretary of the Treasury and the Treasurer of the United States had possession of a specific fund, appropriated by Act of Congress, which the Department of State had obtained from Venezuela on behalf of United States citizens as reparations for appropriation of their property rights in Venezuela. The government officials proposed to pay this fund to Orinoco Company, Limited. The Orinoco Iron Company, another claimant, brought an action to enjoin the officials from making this payment on the ground that it was entitled to a portion of the proceeds. The Court sustained an injunction restraining the payment on the grounds that the Orinoco Iron Company had a valid equitable lien upon this fund and that the government officials conceded that they were stakeholders and had no remaining duties other than the ministerial act of payment.

will lie to compel government officials to perform ministerial duties, those cases hold that, where a specific fund in which the government has no interest has been appropriated for payment to a designated individual and is in the possession of the Secretary of the Treasury for the purpose of payment, one claiming an "equitable lien" on that fund may enjoin its payment pending his action against the beneficial owner. The cases stress, however, that such relief is "[c]onfined, as it necessarily must be, to cases where the officials of the Government have only a ministerial duty to perform" (252 U.S. at 473; 266 U.S. at 126)—that is, where "payment of the fund in question to the [designated individual] is a ministerial duty, the performance of which could be compelled by mandamus" (*ibid.*).

Those cases do not help petitioners.[9] Under the Stipulation of Settlement, the government has a direct interest in the funds it is holding. Should occasion arise to invoke the indemnity provisions of the Settlement, the government may apply the funds without leave of any court (§ IX(5), J.A. 68–69).[10] Nor can payment of the funds to Interhandel be compelled by mandamus. Such payments are only to be

[9] *Barnes* v. *Alexander*, 232 U.S. 117, also cited by petitioners (Pet. 11), was not an action to which the United States was a party, nor did it involve funds in the Treasury.

[10] The statement at page 17 of the petition that the United States has no interest in the indemnity fund which it holds "other than a right to go to court to attempt to foreclose upon it in the event that Interhandel fails to perform its obligations" is contrary to the express terms of the Settlement Agreement. See § IX(5) (J.A. 68–69). See, also, *Kelberine* v. *Societe Internationale*, *supra*, 363 F. 2d at 994.

made "from time to time, as determined by the Attorney General, to the extent that the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by Section IX of this Stipulation" (§ VIII(4), J.A. 67), and mandamus will not issue where a decision to act or not to act is left to the discretion of a responsible official (*Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 318).

The Court of Appeals for the District of Columbia Circuit [11] recently rejected a similar suit by other private individuals to tap the same fund petitioners here seek to reach, stating (*Kelberine* v. *Societe Internationale*, 363 F. 2d at 994):

> [I]t is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

[11] This Court denied certiorari in *Kelberine* four months ago. 385 U.S. 989, 1044. Petitioners seek to distinguish *Kelberine* on the ground that the plaintiffs there did not assert an equitable lien on the funds in the Treasury (Pet. 20). But the opinion in that case states expressly that the question of the presence or absence of an equitable lien was "immaterial" to its decision that the action was properly dismissed as an unconsented suit against the United States. See 363 F. 2d at 995.

2. Petitioners also argue that they may maintain this action because they are willing to postpone receipt of the money to which they claim entitlement until the government is satisfied that it can be disbursed without injury to its security interest. The same argument was made by counsel in *Kelberine, supra,* and not accepted by the court of appeals. As the district court in this case noted (J.A. 53), petitioners cite no authority which supports jurisdiction over the United States on this "postponed lien" theory.[12] *Houston* v. *Ormes* and *Mellon* v. *Orinoco Iron Co.* carve out a narrow exception to the rule that the government may not be sued without its express consent and petitioners do not come within this exception. *Kelberine* v. *Societe Internationale, supra.*

3. Petitioners urge finally (Pet. 22) that "equitable principles" require that they be permitted to press their liens at this time. Their lawsuits, however, arise entirely out of secret private arrangements al-

[12] As we noted above, pp. 9–10, n. 6, 40 U.S.C. 308 and 309 expressly disavow the creation of any right to claim property in the government's possession. The other authorities cited by petitioners do not support their arguments. *Stevan* v. *Union Trust Co.*, 316 F. 2d 687 (C.A.D.C.), was not a suit against the United States. In *United States* v. *Leventhal*, 316 F. 2d 341 (C.A.D.C.), it was the United States that was asserting the priority of its tax lien on property in the custody of the court. *Hawley* v. *Hawley*, 114 F. 2d 745 (C.A.D.C.), was a suit between private parties only. The case did not, therefore, even purport to consider the jurisdiction of the district court to entertain actions against the United States. In *Doerschuck* v. *Mellon*, 55 F. 2d 741, 744 (C.A.D.C.), the court of appeals carefully noted that—unlike the instant proceeding—the money in the Treasury was "a special fund to which the United States make no claim and assume no liability."

legedly entered into between themselves and Interhandel. Those agreements were in no way intended to confer benefits upon the United States government, and hence it is not inequitable for the United States to withhold its consent to be sued.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the judgments in favor of the Secretary of the Treasury should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.
BAREFOOT SANDERS,
Assistant Attorney General.
MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

APRIL 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967